

AUDIT REGULATIONS	RULEMAKING COMMENTS FIRST AND SECOND 15 DAY COMMENT PERIODS	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
10100.2 – 10115.2	Several references remain regarding Vocational Rehabilitation penalties. These should be removed with the sun-setting of the underlying statute. We question whether penalties can be levied where there is no longer statutory authority.	Steven Suchil Assistant Vice President American Insurance Association Written comment January 30, 2009	Disagree. The revisions made to the proposed audit regulations during the first and second 15-day comment periods did not include changes to the existing and initially proposed provisions regarding vocational rehabilitation. As such, the Division is not required to respond to this comment. Regardless, although the right to receive vocational rehabilitation benefits expired on January 1, 2009 (see repealed Labor Code section 139.5), claims for which such benefits are may be owed are subject to audit (see section 10107(c)) by the Audit Unit and the assessment of administrative penalties if indemnity payments are owed.	None.
	The proposed regulations state that they shall be effective as of January 1, 2009. Since that date has passed, and the regulations have further to go in the rule-making process, this will		Agree. It is appropriate that the proposed audit regulations become effective 60 (sixty) days after their approval and filing with the Secretary of	Amend section 10101.1 to provide that the regulations shall take sixty (60) days following the

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	require retroactive compliance by affected parties. We recommend changing the effective date to at least 60 days after filing the final rules. This will give claims organization time to change systems and work flows to comply with the changes. In our earlier comments we objected to some of the detail required in the proposed file construction. The objection continues.		State. Sixty days appears to be a reasonable time for claims administrators to change their business practices to comply with the new regulations.	filing of the final rules with the Secretary of State.
10111.2(a)(10)	While an additional penalty may be imposed for a late payment or failure to pay an award, we question the inflexible nature of the change to a 100 percent penalty, from “up to 100 percent”. We also believe that there is a difference between a late payment and a complete failure to pay, and that these situations should be dealt with separately.		Disagree. The Division initially proposed an amendment allowing for a penalty increase of “up to” 100%, but has now reverted to the existing language which provides for a flat 100% increase. This return to the existing language is appropriate as the structure of section 10111.2 does not provide the Audit Unit with discretion to determine the amount of an administrative penalty within a specific range prior to mitigation under subdivision (c). Further, the Division recognizes that there is a difference between a late	None.

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			payment of indemnity and a complete failure to pay. The amount administrative penalties assessed under the various provisions of subdivision (a) reflect this difference. However, the penalties assessed under subdivision (a)(10) do not primarily address the timeliness of payment, but rather the fact that the late payment or failure to pay was in violation of an express award or order by the Workers' Compensation Appeals Board, Administrative Director, or Rehabilitation Unit.	
10100.2 – 10115.2	All references to vocational rehabilitation and penalties for vocational rehabilitation infractions. Should be removed. Since the right to receive vocational rehabilitation was repealed in 2004 and effective on January 1, 2009, there is no longer a statutory basis for the vocational rehabilitation benefit, the underlying regulations, or penalties for regulatory infractions.	Michael McClain, General Counsel & Vice President; Brenda Ramirez, Claims and Medical Director California Workers' Compensation Institute Written Comment January 30, 2009	See above response to similar comment by the American Insurance Association.	None.

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10101.1	<p>Recommendation:</p> <p>This section applies to maintenance of claim files for injuries occurring on or after January 1, 1994.</p> <p>Every claims administrator shall maintain a claim file of each work-injury claim including claims which were denied. For injuries reported on or after <del>January 1, 2009</del> <u>the effective date of these regulations</u>, each claims administrator shall maintain a claim file for each indemnity and medical-only claim, including denied claims, and shall ensure that each file is complete and current for each claim. Contents of claim files may be in hard copy, in electronic form, or some combination of hard copy and electronic form. Files maintained in hard copy shall be in chronological order with the most recently dated documents on top, or subdivided into sections such as medical reports, benefit notices, correspondence, claim notes, and vocational rehabilitation. <del>Files or portions of files maintained in electronic form shall be easily retrievable.</del> All open claim files shall be <del>maintained</del> <u>accessible</u> at the</p>		<p>Agree in part. See response to comment by American Insurance Association regarding the effective date of the proposed regulations.</p> <p>Use of the phrase “easily retrievable” is reasonable. Merriam-Webster’s definition of “retrievable” includes “to get and bring back; especially: to recover (as information) from storage”. This definition corresponds to the use of the word in the proposed amendment: electronic claim files must be easily retrievable.</p> <p>Similarly, the use of the word “maintained” is reasonable. Merriam-Webster’s definition of “maintain” includes “to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline &lt;maintain machinery&gt;”. It would be expected that the adjusting location responsible for administering the claim would</p>	None.

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	<p>adjusting location responsible for administering the claim. The file shall contain but not be limited to:</p> <p>Discussion The changes in these regulations should be prospective rather than retrospective. CWCI recommends an effective date that is at least 90 days after the date of adoption of the new regulations.</p> <p>The phrase “easily retrievable” is equivocal and duplicative. Because this phrase is subject to various interpretations, the sentence should be removed. The requirement that the files selected for auditing be made available promptly is adequately stated earlier in these regulations.</p> <p>Although usually the case, files are not always physically maintained at the adjusting location responsible for administering the claim. For the purposes of the audit, it is not necessary that claims files to be physically maintained at the adjusting location; it is only necessary that they are readily accessible at the adjusting location.</p>		<p>also be the location where such a file is maintained. Note that the current language of the regulation provides “All open claim files shall be kept at the adjusting location for the file.” The amended sentence, “All open claim files shall be maintained at the adjusting location responsible for administering the claim”, makes far more sense and recognizes the use of electronic files.</p>	

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10111.2(a)	<p>Penalty Amounts for Payments Violating Awards or Orders.</p> <p>Recommendation  (10) Penalty amounts assessed pursuant to subdivisions (a)(1) through (a)(9) will be increased by <u>up to</u> 100%, but will not exceed \$5000 except as provided by Labor Code section 129.5(c)(3), if the failure to pay or late payment was in violation of an award or order of the Workers' Compensation Appeals Board, the Rehabilitation Unit, or the Administrative Director. When the award or order is not specific to, but only stated as a lump sum, of any benefit pursuant to subdivisions (a)(1) through (a)(9) above, the increased penalty amount of <u>up to</u> 100% as specified above shall be determined based on the equivalent amount of unpaid indemnity as assessed under subdivision (a)(2), (a)(3), or (a)(4) of this section. Increased penalties under this subdivision will be separately assessed for late compliance and/or the failure to pay any portion of an award or order.</p>		Disagree. See above response to similar comment by the American Insurance Association.	None.

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	<p>Discussion:</p> <p>Because there is a significant difference between benefits paid late and benefits not paid at all and for a myriad of other extenuating circumstances, CWCI believes it appropriate for penalties to be stated as a range -- up to 100%, so that penalties for late payment can be assessed at lower levels than those for nonpayment. The discretion in the amount of the penalty assessed will remain with the auditors and the Division.</p>			
10100.2 through 10115.2	<p>We have no comments on the proposed changes in the two 15 day comment periods. Overall, the proposed revisions to the audit regulations are well presented and will assist the industry in understanding the audit process and application of the penalty assessments. State Fund appreciates the time and effort the Division of Workers' Compensation (DWC) has put into these regulations.</p>	<p>Marie W. Wardell, Claims Operations Manager State Fund Written Comments February 6, 2008</p>	<p>The Division appreciates the comments submitted by State Fund throughout this regulatory process.</p>	<p>None.</p>